Supreme Court, U.S.
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No. 09-1444

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

In re DANIEL G. ANDERSON, WILLIAM COLLITON, M.D.; RICHARD P. DELANEY, M.D.; GAETANO MOLINARI, M.D.; RICHARD LORIA, M.D.; LORENZO MARCOLIN, M.D. JAMES RONAN, M.D.; EDWARD SHERIDAN, M.D.; EDWARD SOMA, M.D.; and RONALD USCINSKI, M.D.,

Petitioners,

versus

BARACK HUSSEIN OBAMA,

Respondent.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION, AND THE HONORABLE PETER J. MESSITTE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. Whether the Court, which possesses the power to issue a writ of mandamus directly to a Federal District Court without any prior application for relief to a Court of Appeals when the Court deems a situation sufficiently exceptional, would so deem in this case.

2. Whether the Court should, under the exceptional circumstances of the instant case, consider issuing a preliminary injunction enjoining the implementation and enforcement of the health care bill (HR 3590) pending full review by the judicial branch of government of violation of the **separation of powers** by the Chief Executive in **procurement** of the health care legislation, including breach of the Origination Clause of the United States Constitution.

LIST OF PARTIES

Petitioner Daniel G. Anderson, a citizen of Maryland who resides in Chevy Chase, Maryland, and who holds a degree in economics from Yale University, is a former officer in the U.S. Navy and veteran of the Korean War, and is now retired.

Petitioner William Colliton, M.D., a citizen of Maryland who resides in Bethesda, Maryland, is currently a Clinical Professor of Obstetrics and Gynecology at George Washington University Medical Center in Washington, D.C.

Petitioner Richard P. Delaney, M.D., is a citizen of Maryland who resides in Silver Spring, Maryland, and is currently a General Practitioner with an active family practice of over fifty (50) years.

Petitioner Richard Loria, M.D., is a citizen of Virginia who resides in McLean, Virginia, whose medical specialty is Allergy and Immunology, and who currently works as a lecturer to the medical profession.

Petitioner Lorenzo Marcolin, M.D., is a citizen of Maryland who resides in Potomac, Maryland, and is an orthopedic physician.

Petitioner Gaetano Molinari, M.D., is a citizen of Maryland who resides in Chevy Chase, Maryland, and is currently a Neurologist and the Chairman Emeritus of the Department of Neurology at George Washington University in Washington, D.C.

Petitioner James Ronan, M.D., is a citizen of Maryland who resides in Potomac, Maryland, and is a cardiologist and the author of cardiology textbooks that are used in the medical profession.

Petitioner Edward Sheridan, M.D., a citizen and resident of Washington, D.C., is a psychiatrist and the former Chairman of the Department of Psychiatry at Georgetown University.

Petitioner Edward Soma, M.D., is a citizen of Maryland who resides in Kensington, Maryland, and is a radiologist, the Founding Chairman of the Department of Radiology and Nuclear Medicine of Holy Cross Hospital, and has served on the Board of the St. Jude's Hospital (Danny

Thomas hospital) in Memphis, Tennessee, for more than 40 years, many of those years as Chairman of the Board.

Petitioner Ronald Uscinski, M.D., is a citizen of Virginia who resides in Great Falls, Virginia, is a neurosurgeon and a graduate of the Georgetown University School of Medicine, a Senior Surgeon with the U.S. Public Health Service, and an Assistant Professor in the Department of Neurological Surgery, Georgetown University and George Washington University.

Defendant Barack Hussein Obama is the President of the United States.

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STATEMENT OF THE CASE

1. That the instant case was filed on January 5, 2010, following the Christmas Eve passage in the United States Senate of 'ObamaCare' (named for its chief protagonist).

2. That the Complaint was predicated upon a violation of the **Origination Clause** fundamental to our Constitution (see Page A-52) and **separation of powers** (see Page A-50) by the Chief Executive, who sought to usurp the powers of the legislature, becoming in essence the 'chief legislator,' seeking to force his agenda through the Congress at perilous cost to the nation and its Constitution.

3. That unlike subsequent actions by Attorneys General of the states challenging the constitutionality of 'ObamaCare' as passed, the instant Complaint seeks to challenge the constitutionality of the **process** by which the Chief Executive transgressed the separation of powers in order to exact passage thereof.

4. That the aforementioned action of the current Chief Executive, who violated the separation of powers is reminiscent of a statement made by Thomas Jefferson to George Washington:

> **"If the equilibrium of the three great bodies, legislative, executive and judiciary, could be preserved, if the legislature could be kept independent, I should never fear the result of such a government; but that I could not but be uneasy when I saw that the Chief Executive had swallowed up the legislative branch." . . . Thomas Jefferson, *The Anas*, 1792**

5. That the current Chief Executive, in forcing his will upon the legislature with the passage of 'ObamaCare,' indeed came to "swallow up the Congress," and at the State of the Union address sought to emphasize the preeminence of the executive over the other two branches.

6. That the Petitioners as Plaintiffs in the action below are physicians with stellar credentials in the Washington metropolitan area who see the threat to their profession and stepped forward to challenge the unconstitutional actions by the Chief Executive in the **procurement** of 'ObamaCare.'

7. That Petitioners filed an **initial Motion for Preliminary Injunction** on January 15, 2010, a copy of which along with Memorandum of Law in Support thereof appears in the Appendix beginning at Page A-1.

8. That Judge Peter J. Messitte **scheduled oral argument on Petitioners' Motion for Preliminary Injunction** for March 18, 2010 (memorandum scheduling same appears in Appendix at Page A-21).

9. That at the time of said hearing Petitioners filed a renewed Motion for Preliminary Injunction (Page A-23) in open court March 18, 2010, updated to keep pace with the rapidly developing nature of events and included a request for " . . . **enjoining the enforcement and implementation** of any such health care reform bill after it is signed by the President."

10. That Petitioners also filed in open court on March 18, 2010, a Memorandum of Law in Support of their renewed Motion for Preliminary Injunction (Page A-25) to include discussion of proposed violation of the Origination Clause by the President and House leadership (Page A-28). The health care bill subsequently voted upon by the House in actuality **originated** in the Senate in violation of the **Origination Clause.** The face sheet of the bill as passed by the House and subsequently signed by the President showing on the face thereof that it originated in the Senate is attached hereto (Page A-101). An old House bill was co-opted and stricken. The Senate bill was inserted in its entirety, and sent to the House for ratification. The House 'origination' of ObamaCare becomes more a pretense than reality.

11. That an Order of Court dismissing the First Amended Complaint and acknowledging filing of the proposed Second Amended Complaint (which was filed in open court on March 18, 2010, updated to keep up with the fast-moving nature of events) was subsequently signed by Judge Messitte (Page A-34). The order recites that service of the Second Amended Complaint is deemed

accepted as to the Defendants Nancy Pelosi, Steny Hoyer and James Clyburn and sets dates for respective pleadings in response thereto.

12. Petitioners filed a Memorandum of Law in Support of Motion for Leave to File Second Amended Complaint (Page A-74), and Defendants filed a subsequent Memorandum in Opposition to Plaintiffs' Motion for Leave to File Second Amended Complaint (Page A-80).

13. That subsequent to Judge Messitte's order dismissing Plaintiffs' First Amended Complaint, your Petitioners filed a timely Motion for Reconsideration of that order which **the court to date has failed to rule upon**.

14. That Judge Messitte similarly has **failed to rule on either Petitioners' initial or renewed Motion for Preliminary Injunction or any other pleading subsequent to March 18, 2010, a period of over TWO MONTHS.** The court was fully cognizant of the fact that the Senate bill had not yet been adopted by the House, and the court's inaction facilitated the adoption. The court's continuing and ongoing inaction facilitates implementation of a law that is alleged to have been obtained by flagrant violation of the

Origination Clause and of the separation of powers on the part of the Chief Executive and his Administration.

15. That the progress of the litigation has been inordinately delayed by Judge Messitte. Initially, he sequestered the summons for Barack Obama in his judicial chambers until a call to the Clerk's Office, which in turn transferred the call to Judge Messitte's chambers, secured an agreement from his law clerk to release it. After service of process was effectuated, the judge failed to set an initial hearing on this matter affecting every citizen of the nation until March 18, 2010, and he then failed to take action on either of Petitioners' Motions for Preliminary Injunction, the original of which was dated from the initial filing of the lawsuit in January and the most recent of which is dated from March 18, 2010.

16. That in August of 1999, Petitioners' counsel handled an earlier case against the Clinton Administration assigned to Judge Messitte, a Clinton appointee, in which Judge Messitte in open court announced that he did not intend to issue a final appealable order but rather was activating a little-used "local rule" and

placing the case in "administrative closure." (Page A-97) An appeal of this arbitrary and capricious action was taken to the Fourth Circuit, which agreed that the judge had indeed succeeded in forestalling Plaintiff's right of appeal. (Page A-98) Cert denied by this Court.

17. That the instant case appears to be experiencing a similar fate at the hands of Judge Messitte acting as the sole 'gatekeeper,' prompting us to bring our petition to you on the 'path less traveled.'

18. That affidavits of two of the named Petitioners herein, themselves preeminent physicians in the Washington metropolitan area, are attached hereto (affidavit of Richard P. Delaney, M.D., Page A-57, and Ronald Uscinski, M.D., Page A-68) bespeaking the need for preliminary injunction, along with affidavit of Jennifer Boyer (A-71), an honors graduate who had been scheduled to begin medical school in September.

REASONS FOR GRANTING THE WRIT

This Court possesses and will occasionally exercise in unique and compelling circumstances the power to issue a writ of mandamus directly to a federal district court without any prior application for relief to an intermediate court of appeals. An erudite discussion of same is found in Stern's *Supreme Court Practice, Sixth Edition,* Section 11.2, "Bases for Issuance of Writs of Mandamus," beginning at Page 506: "Where there is an intermediate appellate court, as in the ordinary case in a United States district court, the application 'ordinarily must be made to the intermediate appellate court.' *Ex parte Peru,* 318 U.S. 578, 585 (1943); *United States Alkali Assn. v. United States,* 325 U.S. 196, 202 (1945). The *Peru* case itself, however, as well as other cases it cites, shows that the **Supreme Court possesses,** and will occasionally exercise when it deems a situation sufficiently exceptional, the **power to issue a writ directly to a federal district court without any prior application for relief to a court of appeals**." Stern's *Supreme Court Practice, Sixth Edition,* Sec. 11.2, p. 506-507.

Footnote 4 of the *Peru* case states in pertinent part as follows:

"The suggestion that the Judiciary Act of 1925 was intended to curtail the jurisdiction previously exercised by this Court in granting such writs to the district courts finds no support in the history or language of the Act. The Act was originally prepared by a committee of justices of this Court, by whom it was submitted to Congress for consideration. Four members of this Court gave testimony before Congressional committees in explanation of the purpose and meaning of the Act, and Chief Justice Taft submitted a detailed statement of the changes which the Act would effect . . . there is not a single suggestion that the Act would withdraw or limit the Court's existing discretion to direct the common law writs to the district court when, in the exercise of its discretion, it deemed such a remedy appropriate . . . the exercise of that jurisdiction has placed no undue burden on this Court. It is significant that, since 1925, less than ten of the numerous applications to this Court for such writs have been granted. Only in rare instances has their denial been the occasion for an opinion dealing with questions of public importance." ... *Ex parte Peru,* 318 U.S. 578, footnote 4

Circumstances of the instant case are exceptional; the needs are imperative; and time is of the essence in this unique matter.

Additionally, under the circumstances of the instant case, the Court should preempt authority and consider issuing a preliminary injunction itself.

One thing is certain: The law **tomorrow** and this Court's procedures to effectuate the administration of justice under the Constitution is what the court says it is **today.**

One other thing is certain: **TRILLION** dollar pieces of legislation do not often come out of the Congress. It is also a rarity that a Chief Executive transgresses the separation of powers to achieve by the sheer force of one man's will the most gargantuan and far reaching piece of social legislation ever to come out of the Congress **WITHOUT A SINGLE BIPARTISAN VOTE**. Social Security and Medicare, by comparison, were both enacted with large margins of **bipartisan support**.

Unless a preliminary injunction is entered up by the Court, our Plaintiff, Jennifer Boyer (added to the Second Amended Complaint) (Page A-36), an honors graduate of the University of Kentucky, admitted to the same medical school, will be canceling her plans to go to the medical school which she had dreamed of attending so as to serve the poor in the back hills of Kentucky. She will be

canceling her plans for the reasons set forth in her affidavit (Page A-115). Jennifer and many like her throughout the nation — the best and the brightest scheduled to attend medical school — will cancel their plans to do so.

Should the Court enter up a preliminary injunction enjoining the enforcement and implementation of ObamaCare pending measured consideration of the constitutionality of its procurement by the Chief Executive and leadership of the Congress, then and in that event, Jennifer and many other budding physicians may safely matriculate into medical school this coming September.

Petitioners respectfully pray the forbearance of the Court in accepting this plea from a 'path less traveled' as the obstructions encountered on the ordinary paths have proved insurmountable while the importance of our plea is vital addressing the exigent threat thus caused to the practice of medicine in America.

CONCLUSION

For the foregoing reasons, Petitioners pray:

1. That this Court, upon the finding of exceptional circumstances in the instant case, issue a Preliminary Injunction enjoining the implementation and enforcement of the health care bill (HR 3590) pending full review by the judicial branch of government of violation of the **separation of powers** by the Chief Executive in **procurement** thereof, including **breach of the Origination Clause** of the United States Constitution; and

2. That a writ of mandamus issue from this Court directed to the Honorable United States District Court for the District of Maryland Southern Division, and to the Honorable Peter J. Messitte, Judge of said Court, requiring said Honorable Peter J. Messitte to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable Peter J. Messitte to rule on all other pending motions before his court; and

3. That Petitioners have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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